



City of Albuquerque

Legislative File Number AC-06-18 (version 1)

INTER-OFFICE MEMORANDUM

July 31, 2006

AC-06-18 - 06EPC-00397; Project #1000965 John P. Salazar, agent for Andalucia Development Corporation, Inc. appeals the Environmental Planning Commission's denial of an Appeal of the Impact Fee Administrator's decision, for all or a portion of Lots 1 - 164, Blocks A-H, J, K, 5, & 1 - 54, Lands of Andalucia at La Luz, zoned SU-1 for PRD, located on the NE corner of Namaste Road NW, between Namaste Road NW and Learning Road NW containing approximately 114 acres. (F-11)

INTER-OFFICE MEMORANDUM

July 31, 2006

The following responses correspond to the indexed outline headings of the submitted appeal.

IX. THE IMPACT FEE ASSESSMENT

The origin of this appeal was the assessment of impact fees by the Impact Fee Administrator on Andalucia Phase 3 [Project #1000965 -05EPC-0115 EPC Site Development Plan for Building Permit - 05EPC-01117 EPC Site Development Plan for Subdivision], approved by the Environmental Planning Commission (the EPC) on August 18, 2005. The appellants/ applicants requested a decision from the Impact Fee Administrator to determine whether Phase 3 might have 'vested rights' per the City of Albuquerque Impact Fee ordinance(s); the Administrator's decision was that while Andalucia Phases 1 and 2 do have 'vested rights,' Andalucia Phase 3 does not. (see *Exhibit A* of the EPC PACKET June 8, 2006)

**I. ESSENCE OF THE APPEAL;
VI. MULTIPLE APPROVALS;**

**II. GOVERNMENTAL APPROVALS;
and VIII. (PHASE 3)**

There is no dispute that (I.) this appeal is brought because the appellants claim to have Impact Fee 'vested rights' from an "Original Site Plan for Subdivision" [LANDS OF RAY A. GRAHAM III, Project #10000965-00EPC-01743 EPC Site Development Plan for Subdivision], approved by the EPC on March 22, 2001. There is no dispute that (II, VI, and VIII.) the EPC approved subsequent amendments to this site development plan for subdivision. The appellants claim that these approvals "merely refined and implemented the Original Site Plan for Subdivision;" however the Impact Fee Administrator's determination, upheld by the EPC, is that the referenced approvals do not qualify for Impact Fee 'vested rights,' because further intermediate approvals were needed to obtain the intended level of approval to proceed with development. In fact, the EPC went so far as to make a Condition of Approval for Andalucia Phase 2 that stated future phases "will require further EPC approval." As previously noted, Phases 1 and 2 were determined to have Impact Fee 'vested rights' based on their dates of approval by the EPC (August 21, 2003 for Phase 1, and November 18, 2004 for Phase 2), and the fact that these approvals were for "**an accurate plan**" that showed the approved lot layout, or platting pattern, for each phase.

Additionally, the claims of the appellants that the First Amendment [Phase 1 of Andalucia - Exhibit D of this appeal] allowed for maximum densities set forth in the Original Site Plan to be "carried forward," and that Phase 1 was "simply a continuation of the Original Site Plan for Subdivision," are both contradicted by the fact that this First Amendment included a major adjustment in zoning density for the subject property, from SU-1 PRD **10** dwellings per acre [Exhibit B of this appeal] to SU-1 PRD **5** dwellings per acre [Exhibit D] - a rather significant amendment to be considered a mere refinement, or an implementation, or "in furtherance of the Original Site Plan for Subdivision."

V. RULES AND FACTS

The City Impact Fee ordinance(s) subsection cited in this appeal [§ 14-19- (Parts 1 thru 4) -**12(D)**] refer to the term "**vested rights**," which were created as part of the intent to phase-in the imposition of impact fees. Essentially, 'vested rights' as used in the ordinances allow a grace period for new development to pay *no* impact fees (until July 1, 2007) on properties with certain "**development approvals resulting in vested rights acquired prior to the enactment date**," or adoption date, of the Impact Fee ordinances (December 10, 2004). This was to make clear that impact fees would *only* be assessed on properties that received certain intermediate development approvals *after* the enactment of these ordinances, until the expiration of the grace period "**if a building permit has not been issued within two years from the effective date**" (per the ordinances, EFFECTIVE DATE: July 1, 2005, therefore the grace period expires July 1, 2007).

These ordinances also called for the PROMULGATION OF RULES [§ 14-19- (1 thru 4) -**22**]. The rules were drafted with input from the Impact Fee Advisory Committee, and have been incorporated into the City's Development Process Manual. Section 3.B.2.d of the Impact Fee Regulations [Volume I Chapter 18 of the Development Process Manual] defines the types of development approvals which would result in Impact Fee 'vested rights;' this Section is quoted in this appeal (and the EPC PACKET - Appeal Report - 8 June 2006 - Page 3). Again, the reason for specifically creating 'vested rights' for Impact Fees was to clarify that during the phase-in, the fees would only apply to projects that received

an intermediate approval after the adoption date of these ordinances. These are not the last approvals necessary to obtain a building permit, but they *are* at a level such that the remaining, or outstanding, or last approvals, are approvals which are basically a technical development step. For example if a final plat technically conforms to an approved preliminary plat, it must be approved - i.e. there is no discretion or opportunity to alter the lot layout of the submitted application for final plat approval. Likewise, properties with an approved site development plan for subdivision as contemplated in the Impact Fee regulations have more than just approved design standards; these properties actually have “**an accurate plan**” with an approved lot layout, which essentially only require technical conformance in the preliminary and final plats - i.e. there is no discretion or opportunity to alter the lot layout of the submitted application for preliminary or final plat approval. Two such properties were cited in the EPC PACKET [Appeal Report - 8 June 2006 - Page 4] and were exhibited at the EPC appeal hearing, Anderson Heights (site development plan for subdivision approved by the Development Review Board - the DRB - on June 16, 2004) and Vista Vieja (site development plan for subdivision approved by the DRB on September 29, 2004).

XIII. DEVELOPMENT RIGHTS

In an attempt to aid in the interpretation of Impact Fee 'vested rights,' the appellants have cited the New Mexico Development Fees Act, HOWEVER the definition for “development right” provided in this appeal applies ONLY to the *Transfer of Development Rights* [NMSA § 5-8-43], a separate type of regulation from Impact Fees. While Impact Fees are indeed authorized under the Development Fees Act [§ 5-8-3], there is in fact neither a definition of “development right” nor a definition of “vested right” in the Definitions section of the Development Fees Act [§ 5-8-2].

X, XI, and XII. THE EPC DECISION

Regarding the EPC decision on this appeal, the appellants assert that the Environmental Planning Commission “added language” or “revise[d] the wording of the applicable regulations.” In fact, the EPC did not “revise the rules” but simply adopted Findings [*of Fact*] in its decision to uphold the Impact Fee Administrator's interpretation of the applicable regulations. Section 2.A of the Impact Fee Regulations states: “**The Impact Fees Administrator is hereby authorized to interpret and enforce all provisions of these Rules and the appropriate Impact Fee Ordinance of the City of Albuquerque...**” The Impact Fee Regulations do not provide a bright line as to timing or 'hierarchy' of the types of development approvals that qualify for vested rights, so in this regard the regulations *are* ambiguous and require logical interpretation. This interpretation of these Impact Fee Regulations has been consistent by the Impact Fee Administrator, as in the case of Andalucia Phase 1 and 2, as well as granting Impact Fee 'vested rights' based on the timely approvals of the site development plans for subdivision for Anderson Heights and Vista Vieja. At the EPC hearing the City Attorney advised the Commission that “in New Mexico, as long as [*the Impact Fee Administrator's*] interpretation and decision is reasonable, or there's a reasonable basis for it, his decision is entitled to deference.” (see EPC MINUTES, June 8, 2006, Page 14)

The appellants also assert that the Environmental Planning Commission “denied vested rights to a bulk land plat which was not at issue in the matter before it.” To the contrary, ALL the Findings of Fact referenced by the appellants (No.s' 5, 6, and 8) refer to the matter before the EPC which was a *site development plan for subdivision*, but the Findings specifically identify the fact that what was before the EPC was a site development plan for a bulk land subdivision. The point of the Findings of Fact were to support the interpretation that such a site development plan for subdivision did not qualify for Impact Fee 'vested rights' because further intermediate approvals were needed, and essentially this is also the definition of a bulk land subdivision (Finding No. 8).

III, IV, VII, XIV and XV. RELIANCE

The appellants claim substantial reliance and change in position (a.k.a. financial investment) based on the EPC approval of the Original Site Development Plan for Subdivision and the First Amendment thereafter. The bulk of this reliance/ investment was in the purchase of the property, however there were still substantial development approvals that had to be acquired in order to proceed to building permit. This is no more reliance, nor entitlement, than what anyone can expect when purchasing any property, anywhere. It would be akin to purchasing property that had straight R-1 zoning based on the 'reliance' or 'entitlement' of creating 5,000 square foot lots with maximum building heights and minimum setbacks per the Zoning Regulations - there would still be intermediate development approvals that had to be acquired (preliminary and final plat) in order to proceed to building permit.

The bulk of the cited infrastructure investment in the project [Exhibit F of this appeal] went towards what was necessary for development of Phases 1 and 2, and in fact a waterline connection in Phase 1 to Coors Boulevard has been allowed to be deferred pending the development of Phase 3. But as an example from Exhibit F, the entry and bridge structure for Sevilla Road were clearly needed for access to Phases 1 and 2. Ironically, the “commitment to install” landscaping and a wall along Coors Boulevard are listed as a reliance/ investment that preceded the Impact Fee ordinances, but the actual installation was a requirement for Phase 3 (approved by EPC on August 18, 2005). The appeal also lists “site plan amendments” as an expenditure “in reliance on the Original Site Plan for Subdivision.”

Finally, the appellants assert that the Environmental Planning Commission “DISREGARDED SUBSTANTIAL EVIDENCE OF RELIANCE.” While the EPC Finding of Fact that is cited in the appeal (No. 10) is clearly contrary to the appellants' presentation/ position, this does not necessarily mean that the Commission disregarded the presentation.

CONCLUSION

The Impact Fee Regulations *require* logical interpretation. The appellants *agree* that a bulk land plat does not qualify for Impact Fee 'vested rights.' It is not logical to assign Impact Fee 'vested rights' to a development approval (site development plan for subdivision) that *precedes* a bulk land plat. The fact that these Regulations allow site development plans for subdivision to qualify for Impact Fee 'vested rights' does not mean one can go back to include just *any* previous site plan, the same as one could not

go back and include just *any* historical preliminary or final plat. It is recommended that the City Council uphold the Findings of Fact and the decision of the EPC, and DENY this appeal, thereby upholding the decision of the Impact Fee Administrator that Andalucia Phase 3 does NOT have Impact Fee 'vested rights.'

APPROVED:

Russell Brito, Division Manager
Development Review Division
Planning Department

x:share/council/appeals/2006/ac-06-18